BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Application of California-American Water Company (U210W) for Approval of the Monterey Peninsula Water Supply Project and Authorization to Recover All Present and Future Costs in Rates.	Application 12-04-019 (Filed April 23, 2012)

REPLY BRIEF OF THE DIVISION OF RATEPAYER ADVOCATES ON PREEMPTION

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REPLY BRIEF OF THE DIVISION OF RATEPAYER ADVOCATES ON PREEMPTION

I. INTRODUCTION

Pursuant to Administrative Law Judge ("ALJ") Gary Weatherford's June 1, 2012 Ruling ("ALJ Ruling"), the Division of Ratepayer Advocates ("DRA") hereby files its reply brief addressing the threshold legal question of whether Monterey County Code of Ordinance, Title 10, Chapter 10.72, subsection 10.72.030(B) ("Monterey Ordinance") is preempted by the California Public Utilities Commission's ("Commission") regulatory jurisdiction over investor-owned public utilities ("public utilities").[1]

II. ARGUMENT

A. The Monterey Ordinance is Expressly Preempted by Commission General Order 103-A.

Contrary to assertions by Marina Coast Water District ("MCWD") in its Opening Brief,[2] the Monterey Ordinance is expressly preempted by Commission General Order ("G.O") 103-A.[3]

[1] See *Inyo v. Public Util. Com.* (1980) 26 C.3d 154, 166 (explaining that the Commission's jurisdiction only extends to regulation of investor-owned public utilities. Thus, in the absence of specific statutory authorization, the Commission has no jurisdiction over municipally owned utilities.).

[2] Marina Coast Water District's Opening Brief on Legal Issues Regarding the Feasibility of the Application, A.12-04-019, July 11, 2012, at 5 (referred to below as "MCWD's Opening Brief") (arguing, "[t]here is no express preemption here, because the [Monterey Ordinance] does not conflict with a specific legislative mandate.").

[3] Commission General Order 103-A (Cal. P.U.C., Sept. 10, 2009, Rules Governing Water Service, Including Minimum Standards for Operation, Maintenance, Design and Construction, § I(9), "Preemption of Local Authority") (referred to below as "G.O. 103-A").

The Commission has declared its intent to exercise exclusive regulatory jurisdiction over the location and construction of public utility facilities in California, and therefore, all local agencies acting pursuant to local authority are preempted from regulating the same subject matter. In *Re Rules, Procedures and Practices Applicable to Transmission Lines Not Exceeding 200 Kilovolts ("200 Kilovolts")*, the Commission explained the constitutional and legislative authority that grants it exclusive jurisdiction to regulate the location and construction of public utility facilities, stating,

> The question of whether local agencies are pre-empted from regulating the construction or installation of utility facilities is answered in [Section] 8 of Article XII of the California Constitution, which states, in pertinent part: 'A city, county, or other public body may not regulate matters over which the Legislature grants regulatory power to the Commission.' [Public Utilities Code Section] 761 clearly vests in the Commission regulatory authority over the methods and means of locating and constructing public utility equipment and facilities. . . . The Commission has restated its exclusive jurisdiction over the location and construction of public utility facilities in numerous decisions.

1994 Cal. PUC LEXIS 453, *11-12 (citations omitted). In 2009, the Commission adopted G.O. 103-A, that included a new section which reiterated the Commission's "preemptive" jurisdiction over local agencies purporting to regulate the facilities of investor-owned water utilities ("water utilities"). *Decision Adopting General Order 103-A*, 2009 Cal. PUC LEXIS 455, *15-16.[4] Section I, subdivision 9 of G.O. 103-A provides,

> Local agencies acting pursuant to local authority are preempted from regulating water production, storage, treatment, transmission, distribution, or other facilities (including the location of such facilities) constructed or installed by water or wastewater utilities subject to the Commission's jurisdiction. However, in locating such projects, the utility should consult with local agencies regarding land use matters.

[4] 2009 Cal. PUC LEXIS 455, *15-16 (wherein the Commission adopts G.O. 103-A, stating, "[t]o the extent that the proposed new [preemption] section restates, in its first sentence, the Commission's preemptive regulatory authority over local agencies acting under local authority with respect to water production, storage, treatment, distribution, water and sewer construction, and/or expansion projects of water and wastewater utilities, we find this added language to be practical and reasonable.")

Thus, local agencies acting pursuant to local authority are expressly preempted from regulating water utility facilities, such as water production and water treatment plants.[5] Significantly, this statement of preemptive intent specifically prohibits local agencies from regulating the location of such facilities.

The Monterey Ordinance states that all applicants for a permit to operate a "Desalination Treatment Facility"[6] in the County of Monterey ("Monterey County") must "[p]rovide assurances that each facility will be owned and operated by a public entity."[7] "Desalination Treatment Facility" is defined as a "facility which removes or reduces salts from water to a level that meets drinking water standards and/or irrigation purposes."[8]

Section 1, subdivision 9 of G.O. 103-A applies to and preempts the Monterey Ordinance. The Monterey Ordinance was adopted pursuant to local authority, *i.e*., by the Board of Supervisors of Monterey County; no state or federal legislation required its enactment. Further, the Monterey Ordinance purports to regulate all "Desalination Treatment Facilities" proposed in Monterey County – facilities that *treat* water by removing salts and thereby *produce* water for domestic use and irrigation purposes – including desalination plants proposed by water utilities. This is the same subject matter which G.O. 103-A declares to be under the exclusive regulatory purview of the Commission, *i.e*., the regulation of water treatment and water production facilities constructed by water utilities. Moreover, the Monterey Ordinance also purports to regulate the location of desalination plants constructed by water utilities, insofar as it prohibits the siting of such privately owned facilities in Monterey County. Pursuant to the Monterey Ordinance an investor-owned water utility would be unable to obtain a permit to operate, and therefore construct,[9] a desalination plant in Monterey County unless it were to provide "assurances" that it would transfer ownership and operation of the facility to a public entity. Accordingly, the

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[5] G.O. 103-A, § I(9).

[6] Monterey County Code of Ordinance, Title 10, Chapter 10.72, subsection 10.72.010(requiring all applicants seeking to construct and operate a "Desalination Treatment Facility" to first obtain a permit to construct and a permit operate the facility).

[7] *Id*. at § 10.72.030(B).

[8] *Id*. at § 10.72.010.

[9] *See* Monterey County Code, Section 10.72.010 (stating that no eligible entity "shall commence construction of or operate any Desalination Treatment Facility [defining term] without first securing a permit to construct *and* a permit to operate said facility.") (Italics added).

Monterey Ordinance must fall before the Commission's "preemptive regulatory authority," as expressly declared in Section 1, subdivision 9 of G.O. 103-A, and thus, its requirements are void and unenforceable as applied to investor-owned water utilities regulated by the Commission.

B. The Monterey Ordinance Conflicts with Public Utilities Code Section 1005, Subdivision (a) because it Purports to Supplant the Commission's Legislatively Authorized Discretion to Determine Whether Public Convenience and Necessity Require Public Ownership of Projects to be Constructed by Investor-Owned Public Utilities.

Contrary to MCWD's contentions,[10] the Monterey Ordinance is preempted, and thus, unenforceable and void as applied to investor-owned public utilities, because it purports to supplant the Commission's legislatively authorized discretion to determine whether public ownership of any proposed desalination project in Monterey County is required by considerations of public necessity and convenience.[11] In particular, the Monterey Ordinance conflicts with Public Utilities Code Sections 1001 and 1005, subdivision (a).[12] Section 1001 provides that investor-owned public utilities must obtain a certificate of public necessity and convenience ("CPCN") from the Commission prior to constructing utility facilities, *i.e.*, a "line, plant, or system, or any extension thereof." Section 1005, subdivision (a) states that the Commission "may attach to [the CPCN] terms and conditions, including provisions for the acquisition by the public of the franchise or permit and all rights acquired thereunder and all works constructed or maintained by authority thereof, *as in its judgment the public convenience and necessity require*." (Italics added). As the California Supreme Court instructs, "[i]t is for the [C]ommission [not interested parties] to determine what public convenience and necessity require [in granting a CPCN]. [The preference of an interested party] is only one of the facts the [C]ommission may properly consider." *Ventura County Waterworks v. Public Util. Com.* (1964) 61 Cal. 2d 462, 465.

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[10] MCWD's Opening Brief, at 8 (arguing that unless the Commission finds that considerations of public convenience and necessity require "Cal-Am's private ownership of the desalination plant," the Monterey Ordinance cannot be preempted "since it would still be compatible with legislative intent and the Commission's authority to regulate Cal-Am's sale and delivery of water to its ratepayers).

[11] *See* Opening Brief of the Division of Ratepayer Advocates on Preemption and Water Rights Issues, A.12-04-019, July 11, 2012, at 10 (referred to below as "DRA's Opening Brief").

[12] All further statutory references are to the Public Utilities Code unless otherwise specified.

Pursuant to California law, local governments like Monterey County may not enforce local legislation that conflicts with general law, such as the Commission's rules and regulations, either expressly or by legislative implication. Cal. Const., art. XI, § 7 ("[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations *not in conflict with general laws*.") (italics added); Cal. Const., art. XII, § 8 (providing that "as to matters over which the [Commission] has been granted regulatory power, the [Commission's] jurisdiction is exclusive," *Southern Cal. Gas Co. v. City of Vernon* (1995) 41 Cal. App. 4th 209, 215, but also confirming that local entities retain a limited ability to regulate investor-owned public utilities in matters of strictly local concern); *Leslie v. Superior Court* (1999) 73 Cal. App. 4th 1042, 1046 (citations omitted) ([t]he powers granted by the [Commission], including its rules and regulations, constitute general state laws. Accordingly, counties may not enforce local regulations that conflict with rules and regulations of the [Commission]."). "A conflict exists if the local legislation duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication. . . . [L]ocal legislation is contradictory to general law when it is inimical thereto." *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal. 4th 893, 897 (citations omitted) (internal quotation omitted). In other words, local legislation conflicts with general law if it "prohibits what the statute commands or command[s] what it prohibits." *Id*. at 902.

Significantly, in deciding conflict questions involving federal and state law,[13] the United States Supreme Court and federal district courts recognize that an important statutory feature indicating legislative intent to preempt "intrusions into an agency's work is the granting of discretion to the agency in its decision-making." *In re Bridgestone/Firestone Inc.*, *ATX, ATX II & Wilderness Tires Prods. Liab. Litig.*, 153 F. Supp. 2d at 945 (citing *Chi. & N. W. Transp. Co. v. Kalo Brick & Tile Co.* (1981) 450 U.S. 311, 321) ("[t]he exclusive and plenary nature of the [Interstate Commerce Commission's] authority to rule on carriers' decision to abandon lines is critical to the congressional scheme, which contemplates comprehensive administrative

[13] Comparable to preemption principles that apply under California law, pursuant to federal law conflict preemption "occurs when requirements of state law and federal law make it impossible for a party to comply with both laws or when state law prevent[s] or frustrate[s] the accomplishment of a federal objective." *In re Bridgestone/Firestone Inc., ATX, ATX II & Wilderness Tires Prods. Liab. Litig.* (S.D. Ind. 2001) 153 F. Supp. 2d 935, 940 (citing *Geier v. American Honda Motor Co. Inc*. (2000) 529 U.S. 861, 873-74) (internal quotation omitted)).

regulation of interstate commerce."). For example, the Federal District Court *In re Bridgestone/Firestone Inc., ATX, ATX II & Wilderness Tires Products Liability Litigation* held that plaintiffs' request for a court-ordered recall of allegedly defective Firestone tires based on the state common law principle of injunctive relief, was preempted by the Motor Vehicle Safety Act ("Safety Act"), 49 U.S.C. Sections 30101 *et seq*., after having concluded that the breadth of statutory discretion vested in the United States Secretary of Transportation ("Secretary") under the Safety Act suggested "congressional intent to limit judicial interference with the agency's work regarding recalls." *Id*. at 937-939, 945-946 (citing *Kalo Brick*, 450 U.S. at 321) (internal quotation omitted). In support of its decision, the Federal District Court identified specific sections of the Safety Act dealing with notification and remedies that granted the Secretary "much discretion to determine the need for notification or remedy of a defect or failure to comply with safety regulations." *Id*. at 945 (citing 49 U.S.C. §§ 30119(d)(2), 30119(b), and 30118(d)). Therefore, the Federal District Court held that "any state law providing for a motor vehicle safety recall would frustrate the purposes of the Safety Act," explaining,

> To illustrate, as noted above, the Secretary can determine that a defect or noncompliance is sufficiently inconsequential as not to warrant notification or a remedy. Should [the agency] reach this decision about a particular defect or noncompliance, a court ruling essentially 'overturning' the Secretary's decision on the basis of state law would obviously upset the congressional intent of *leaving the question to an agency with the expertise, experience, and resources to reach sound decisions*."

Id. at 945-946 (citations omitted) (italics added).

Here, the Monterey Ordinance states that all applicants for a permit to operate a desalination plant in Monterey County must "[p]rovide assurances that each facility will be owned and operated by a public entity."[14] This requirement, as applied to investor-owned utilities, such as California-American Water Company ("Cal-Am"), contradicts Section 1005, subdivision (a) by taking a question that is within the exclusive discretion of the Commission to decide – whether public convenience and necessity, in fact, require that proposed plant facilities be publicly owned – and pre-determining the outcome in all cases in which the requisite "assurances" are provided. Thus, the Monterey Ordinance purports to supplant the

[14] Monterey County Code of Ordinance, Title 10, Chapter 10.72, subsection 10.72.030(B).

Commission's legislatively authorized discretion to decide whether considerations of public convenience and necessity require public ownership of proposed plant facilities with a ministerial act beyond the Commission's regulatory purview. The Monterey Ordinance is thus an affront to the Commission's exercise of its legislatively authorized discretion, as provided in Section 1005, subdivision (a), and accordingly, is inimical, or hostile, to general law. Because it purports to supplant, and thereby effectively prohibit or prevent the Commission's lawful exercise of its discretion, the Monterey Ordinance is unenforceable and void as applied to investor-owned public utilities.[15] *Sherwin-Williams Co. v. City of Los Angeles*, 4 Cal. 4th at 897 (citations omitted) (internal quotation omitted) ("[i]f otherwise valid local legislation conflicts with state law, it is preempted by such law and is void.").

Further, although preemption principles that govern conflicts between federal and state law do not dictate the outcome here, a broad statutory grant of discretionary power to an agency is a persuasive indicator of legislative intent to preempt "intrusions into an agency's work." Similar to the conclusion reached by the Federal District Court in *In re Bridgestone/Firestone Inc.*, *ATX, ATX II & Wilderness Tires Prods. Liab. Litig.*, the Monterey Ordinance contradicts the express statutory language of Section 1005, subdivision (a), that grants the Commission exclusive authority to determine the specific question of whether public convenience and necessity require public ownership of plant facilities, and accordingly, upsets legislative intent to leave this precise question "to an agency with the expertise, experience, and resources to reach sound decisions." 153 F. Supp. 2d at 945-946 (citations omitted).

C. *Leslie v. Superior Court* is Inapposite Because the Monterey Ordinance is Not of Equal Dignity to the Rules and

[15] Notably, were the Commission to consent to the authority of Monterey County to impose such a conflicting requirement, it would, in effect, be improperly delegating its power to decide the question of whether public convenience and necessity require public ownership of plant facilities to an interested party, the county. See *Ventura County Waterworks*, 61 Cal. 2d at 465 (italics added) ("[b]y holding that failure of the subdividers to commence annexation proceedings precluded considering the district as a possible alternative source of water service, *the [C]ommission in effect delegated its power to decide the question of public convenience and necessity to the subdividers.*"). MCWD is, of course, also an interested party in the Commission's ultimate determination as to whether public necessity and convenience require public ownership of a desalination plant in Monterey County. MCWD's Opening Brief, at 9 ("As MCWD has repeatedly said to the Commission and the parties, it is still willing and able to work with Cal-Am to provide desalinated water for Cal-Am's purchase and delivery to the Monterey Peninsula.").

Regulations of the Commission and the Commission Has Promulgated Rules and Regulations on the Subject at Issue, the Construction, Operation, and Ownership of Plant Facilities by Investor-Owned Public Utilities.

Contrary to MCWD's contentions,[16] *Leslie v. Superior Court* is inapposite because the Monterey Ordinance is not of equal dignity to the rules and regulations of the Commission, (1999) 73 Cal. App. 4th 1042, 1049, and the Commission has promulgated rules and regulations on the subject at issue, *i.e.*, the construction, operation, and ownership of plant facilities by investor-owned public utilities, see *e.g.*, Pub. Util. Code §§ 761, 762, 768, 1001, 1005(a); G.O. 103-A, §VII, "Operation and Maintenance."

In *Leslie v. Superior Court*, the California Court of Appeal held that the Commission had not preempted the field of grading and maintaining access roads within easements granted to investor-owned public utilities, and thus, Southern California Edison Company was required to comply with a county building code ordinance that incorporated minimum statewide standards related to grading and drainage. 73 Cal. App. 4th at 1046, 1052-1053. The county building code ordinance at issue in the case had been adopted "pursuant to and in conformity with the State Housing Law," Health & Safety Code Sections 17910 *et seq.* *Id.* at 1048. Thus, the *Leslie* Court reasoned that the county building code "is not a purely local scheme because it incorporates the comprehensive State Housing Law that speaks to grading and excavation of roads." *Id*. As the Court of Appeal further explained,

> The State Housing Law and [Commission] rules and regulations are of equal dignity. Where there are conflicts between such statutory schemes, we must determine whether there is any possible construction that will harmonize the two. But here there is no conflict because the [Commission] has not generated rules or regulations on the subject at issue.

Id. at 1049 (citation omitted) (internal quotation and punctuation omitted). Notably, earlier in the decision the *Leslie* Court also stated that the Commission had not "purported to exercise its authority over such matters." *Id*. at 1048. Thus, the Court of Appeal concluded that the Commission's regulatory authority does not preempt "statewide standards governing grading and maintenance of roads." *Id*. at 1049.

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[16] MCWD's Opening Brief, at 6 (arguing that the Commission has neither promulgated rules concerning desalination plants nor exercised its authority over such matters).

By contrast, the Monterey Ordinance, is purely local legislation, and thus, is not of equal dignity with the Commission's rules and regulations. Despite MCWD's contention that the state agency publications and legislative proposals referenced in its Opening Brief demonstrate that desalination "is an issue of statewide interest, not a purely local issue,"[17] the analogy to *Leslie v. Superior* Court is unavailing because no California legislative enactment required Monterey County to adopt the Monterey Ordinance. Issues surrounding desalination may certainly have statewide implications. But the only relevant inquiry under *Leslie v. Superior Court*, as applied to the instant case, is whether the Legislature has enacted a statutory scheme to regulate the construction, operation, and ownership of desalination plants, and, if so, whether such a scheme conflicts with the rules and regulations of the Commission. As MCWD's description of the current state of affairs makes clear, the Legislature has not enacted such a statutory scheme, and thus, MCWD's reliance on *Leslie v. Superior Court* is misplaced.

Further, as noted, the Commission has promulgated rules concerning the construction, operation, and ownership of plant facilities by investor-owned public utilities. Unless and until the Legislature enacts a statutory scheme that grants another agency jurisdiction to permit and regulate all desalination plants in California, the Commission's rules and regulations applicable to investor-owned public utilities govern and preempt any conflicting local legislation concerning the same subject matter.

In addition, MCWD also argues that the Commission has not purported to exercise its jurisdiction over the "construction, maintenance, operation or ownership of desalination plants," thereby contending that the instant case is controlled by *Leslie v. Superior Court*, where, as noted, the Court of Appeal concluded that the Commission had not purported to exercise its jurisdiction over the grading and maintenance of access roads.[18] MCWD is wrong. While the term "desalination" may not show up in the Public Utilities Code, the Commission has certainly exercised its jurisdiction over proposals by investor-owned public utilities to construct, maintain, operate and own desalination plants in California, as it is doing in the instant proceeding, and further, currently exercises regulatory jurisdiction over the maintenance and operation costs incurred by California-American Water Company pursuant to its lease of the Sand City

[17] MCWD Opening Brief, at 7.

[18] *Id*. at 6 (citing *Leslie*, 73 Cal. App. 4th at 1048) (internal quotation omitted).

Desalination Facility. *Application of California-American Water Company (U210W) for Authorization to Increase its Revenues for Water Service in its Monterey District,* 2009 Cal. PUC LEXIS 346, *88 (wherein the Commission states, "we find that Cal-Am has failed to meet its burden of proving that the Sand City Desalinization Plant lease is reasonable and prudent; however, with limitations on the inclusion of costs under the lease in Cal-Am's revenue requirement, water may be reasonably purchased pursuant to this lease.").

D. Monterey County Cannot Circumvent the Commission's Proper Exercise of its Jurisdiction with a Preemptive Lawsuit in Superior Court for Adjudication of an Issue that is Currently Being Determined by the Commission in the Instant Proceeding.

Monterey County[19] cannot circumvent the Commission's proper exercise of its jurisdiction over investor-owned public utilities with a preemptive lawsuit in superior court for adjudication of an issue that is currently being determined by the Commission in the instant proceeding.

As repeatedly explained by the California Supreme Court, the "[Commission] has exclusive jurisdiction over the regulation and control of utilities, and once is has assumed jurisdiction, it cannot be hampered, interfered with, or second-guessed by a concurrent superior court action addressing the same issue." *Hartwell Corp. v. Superior Court* (2002) 27 Cal. 4th 256, 275 (quoting *San Diego Gas & Electric Co. v. Superior Court* ("*Covalt"*) (1996) 13 Cal. 4th 893, 918, fn.20) (internal quotation omitted). The Legislature has vested the California Supreme Court and the California Court of Appeal with exclusive jurisdiction to review Commission actions. Pub. Util. Code § 1759. Public Utilities Code Section 1759, subdivision (a) declares, in part:

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[19] Opening Brief of the County of Monterey and Monterey County Water Resources Agency on Legal Issues in Accordance with Administrative Law Judge's Ruling Dated June 1, 2012, A.12-04-019, at 1-2 (referred to below as "Monterey County's Opening Brief") (suggesting the Commission lacks authority to determine whether the Monterey Ordinance is preempted by the Commission's regulatory jurisdiction, and further, asserting that the Commission is prohibited by the California Constitution from determining that the Monterey Ordinance is unenforceable or invalid). Although Monterey County's Opening Brief was filed jointly by Monterey County and the Monterey County Water Resources Agency ("Agency"), Monterey County is identified as the sole plaintiff in the Complaint for Declaratory Relief filed in the San Francisco County Superior Court, *County of Monterey v. California-American Water Company*, Case No. CGC-12-521875, June 26, 2012 (referred to below as "Complaint for Declaratory Relief").

> No court of this state, except the Supreme Court and the court of appeal, to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the [Commission] or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the [Commission] in the performance of its official duties . . . .[20]

Past efforts to circumvent these jurisdictional limitations by "preemptive strikes – whether in the form of a complaint seeking declaratory relief or one seeking an injunction – have been rejected." *American Drug Stores, Inc. v. Jay Stroth* (1992) 10 Cal. App. 4th 1446, 1452.

For example, in *People v. Superior Court* the California Supreme Court issued a peremptory writ of prohibition to restrain the superior court from proceeding with a declaratory relief action filed by a water utility, after determining that Section 1759 precluded the superior court from adjudicating issues that would necessarily be decided in a pending Commission proceeding. (1965) 62 Cal. 2d 515, 518. The Court of Appeal in *American Drug Stores, Inc*. summarized the Supreme Court's decision as follows:

> *People v. Superior Court* involved a declaratory relief complaint in which a water company sought a declaration concerning rights to certain funds it was holding in escrow. The escrow account had been established pursuant to a [Commission] order, and proceedings were under way to decide which parties were entitled to the funds. The water company argued its declaratory relief action was properly before the superior court, notwithstanding the exclusivity provisions of *Public Utilities Code section 1759*, because it was not seeking review, annulment or suspension of an order of the [Commission], but only a decision as to the rights to the funds. The Supreme Court concluded that styling the action as one for declaratory relief did not vest jurisdiction in the superior court. The court reasoned that "the whole matter [disputed in the declaratory relief case] is still pending and undecided before the [Commission] . . . . Under these circumstances *section 1759* precludes the superior court from adjudicating at [the water company's] behest the very issues that will necessarily be presented to the [Commission] . . . [in the pending proceedings]."

10 Cal. App. 4th at 1452 (citing *People v. Superior Court*, 62 Cal. 2d at 516-518) (internal quotation omitted).

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[20] Significantly, Section 1756, subdivision (f) provides that judicial review of Commission decisions "pertaining solely to water corporations shall only be by petition for writ of review in the [California] Supreme Court, except that review of complaint or enforcement proceedings may be in the court of appeal or the [California] Supreme Court." Pub. Util. Code § 1756(f).

Here, Monterey County and the Agency suggest the Commission lacks the authority to determine if the Monterey Ordinance is preempted by the Commission's regulatory jurisdiction, and further, assert the Commission is prohibited by the California Constitution ("Constitution") from determining that the Monterey Ordinance is unenforceable or invalid.[21] Thus, Monterey County and the Agency advise,

> [I]n view of what can be best be described as uncertain Commission authority, both as to its decisional power and as to the preemption question, the County and the Agency urge that the Commission allow the pending lawsuit to run its course as the surest and most effective means of dealing with the Desal Ordinance issue, and as the most efficient use of the Commission's resources.[22]

The Complaint for Declaratory Relief identifies the public ownership requirement of subsection 10.72.030(B) as the source of the present controversy with Cal-Am.[23] Notably, although the Complaint for Declaratory Relief, which was filed on June 26, 2012, indicates Cal-Am has applied to the Commission for a CPCN to construct a desalination plant in Monterey County,[24] it fails to acknowledge the ALJ Ruling issued on June 1, 2012 requested the parties brief the precise question at issue in the declaratory relief action: "Is the County Ordinance Governing Desalination and Limiting Desal Plant Ownership and Operation to Public Agencies Preempted by Commission Authority?"[25]

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[21] Monterey County's Opening Brief, at 2 (*citing* Cal. Const., art. III, § 3.5) (stating that administrative agencies have no power to declare a "statute" unenforceable or unconstitutional unless an appellate court has made such a determination).

[22] *Id*.

[23] Complaint for Declaratory Relief, ¶ 10 (italics added) (stating, "[a]n actual controversy has arisen and presently exists between the County and Cal-Am in that the County contends the Ordinance applies to Cal-Am, that Cal-Am may not construct a desalination facility without a permit to construct [from the County], *that Cal-Am is ineligible for a permit to operate a desalination facility in Monterey County because it is not a public entity and that Cal-Am may not lawfully operate such a facility without such a permit*, whereas Cal-Am disagrees and contends the Ordinance does not apply to Cal-Am and does not need either a permit to construct or a permit to operate a desalination facility [from the County]. . . .").

[24] *Id*. at ¶ 4.

[25] ALJ Ruling, at 3. See *Hickey v. Roby* (1969) 273 Cal. App. 2d 752, 761, fn.1 (faulting appellant for having failed to disclose "material matters concerning pending [Commission] proceedings to which [his complaint and accompanying affidavits] refer," in the complaint for injunctive relief that he filed in superior court).

As explained above, in *People v. Superior Court* the Supreme Court held that Section 1759 precluded superior court jurisdiction because the issues identified in the water utility's declaratory relief action would "necessarily be presented" to the Commission in its pending proceeding. 62 Cal. 2d at 518. Here, preclusion of superior court jurisdiction is even more compelling because the precise issue identified in Monterey County's declaratory relief action as the source of controversy with Cal-Am – whether the Commission's regulatory jurisdiction over investor-owned utilities preempts the Monterey Ordinance[26] – has *already* "been presented" and is currently being determined in the instant Commission proceeding.[27]

Thus, only one question remains: can the Commission properly decide whether its exclusive regulatory jurisdiction over investor-owned public utilities preempts conflicting local legislation? As explained above, the Commission has declared the source of its preemptive regulatory jurisdiction over the construction and location of public utility facilities,[28] and has repeatedly preempted local legislation in its decisions.[29]

Monterey County and the Agency argue the Commission lacks such authority because the term "statute," as used in Section 3.5 of Article III of the Constitution should be read to include "ordinance."[30] However, "statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme." *United States Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs.* (1988) 484 U.S. 365, 371. Thus, any perceived ambiguity in the use of the term "statute" in Section 3.5 of Article III is dispelled by Section 7 of Article XI, which expressly refers to local "ordinances."[31] If the

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[26] Complaint for Declaratory Relief, ¶ 10.

[27] ALJ Ruling, at 3. Significantly, even if the superior court asserted jurisdiction over Monterey County's declaratory relief action, "a later decision by the [Commission], within its jurisdiction, [would] have the effect of superseding the prior [superior court] judgment and rendering it of no effect whatsoever insofar as it conflicts with the [Commission's] order."). *Hickey*, 273 Cal. App. 2d at 746 (citations omitted).

[28] See *infra* Section II(A); *200 Kilovolts*, 1994 Cal. PUC LEXIS 453, *11-12 (*citing* Cal. Const., art. XII, § 8; Pub. Util. Code § 761).

[29] See e.g., *200 Kilovolts*, 1994 Cal. PUC LEXIS 453, *16; *Town of Woodside v. PG&E* (1978) 83 CPUC 418.

[30] Monterey County's Opening Brief, at 1-2.

[31] Cal. Const., art. XI, § 7, Local ordinances and regulations ("A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."). The core principle of conflict preemption embodied by Section 7 of Article 11, *i.e.*, that state law, *e.g.*, statutes, preempts conflicting local law, *e.g.*, ordinances, flies in the face of the contention

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drafters of the Constitution had intended Section 3.5 of Article III to apply to local ordinances they would have expressly referred to local ordinances in that section, as they did in Section 7 of Article XI.

Respectfully submitted

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by Monterey County and the Agency that "no legal or policy reason indicates a basis" for distinguishing between the terms "statute" and "ordinance" in the Constitution. Monterey County's Opening Brief, at 2.